WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GARY MCKINNEY, ***Applicant,*** **vs.** **UNITED PARCEL SERVICE, administered by LIBERTY MUTUAL INSURANCE COMPANY,** ***Defendants.***	**Case Nos. ADJ6679833** **ADJ8786254** **(Marina del Rey District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration on June 23, 2014, in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant and defendant filed Petitions for Reconsideration of the April 4, 2014 Findings, Award and Order issued by the workers' compensation administrative law judge (WCJ), wherein the WCJ found that applicant, while employed as a driver/dockworker for United Parcel Service (UPS) on August 8, 2008, sustained injury arising out of and in the course of employment to his psyche, but did not sustain injury arising out of and in the course of employment to his back, neck and sleep, causing temporary disability from August 8, 2008 through August 8, 2010, permanent disability in the amount of 12%, and the need for further medical treatment to cure or relieve from the effects of his injury. In finding that applicant's psychiatric injury was caused by his employment, the WCJ rejected the portion of the opinion of the psychiatric Panel Qualified Medical Examiner (PQME), Dr. Charles Furst, Ph.D., which found that 40% of applicant's psychiatric injury was caused by applicant's termination following the injury, which Dr. Furst deemed to be the result of a lawful, nondiscriminatory, good faith personnel action pursuant to Labor Code section 3208.3(h). In support of the determination that applicant did not sustain injury to his back, neck and sleep, the WCJ relied upon the opinion of the orthopedic QME, Dr. Jose Senador.

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Defendant contends that the WCJ's decision should be reversed because the opinion of Dr. Furst regarding applicant's claim of psychiatric injury is substantial evidence that 40% of applicant's psychiatric injury is based upon his termination. The termination is alleged by defendant to be a lawful, nondiscriminatory, good faith personnel action, which supports defendant's denial of injury to the psych pursuant to Labor Code section 3208.3(h). Applicant filed an Answer, disputing defendant's contentions. In her Report and Recommendation on Petition for Reconsideration (Report), the WCJ recommended that defendant's Petition be denied.

Applicant contends: (1) the opinion of Dr. Senador is not substantial evidence on the issue of injury arising out of and in the course of employment to applicant's neck, back, and sleep; and (2) in an argument raised for the first time on reconsideration, Dr. Senador's QME license was suspended during this case, rendering his reports inadmissible. Defendant filed an Answer, challenging applicant's allegations. The WCJ issued a Report addressing applicant's Petition, recommending that this Petition be granted, due to issues related to Dr. Senador's QME license.

As our Decision After Reconsideration, we shall rescind the Findings, Award and Order, and issue a new determination that applicant did not sustain injury to his psyche. We shall affirm the determination that applicant did not sustain injury to his back, neck, and sleep.

Administratively, we note that applicant claimed injury to the same body parts on the specific date of injury of August 8, 2008 in ADJ8786254, as well as for the cumulative trauma date of injury from August 8, 2007 through August 8, 2008, in ADJ6679833. Although neither party has sought reconsideration for the cumulative date of injury in ADJ6679883, reconsideration has been granted on that case as well, due to both case numbers being listed on both of the Petitions, as well as the fact that evidence submitted in both cases only appears in FileNet under ADJ6679833. For purposes of clarification, we provide below that the WCJ's decision in the cumulative trauma date of injury in ADJ6679883 is affirmed. The remainder of our Opinion concerns the specific date of injury in ADJ8786254.

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BACKGROUND

On August 8, 2008, applicant was involved in an auto accident while driving a delivery truck for UPS, which resulted in the death of a motorcyclist. (Minutes of Hearing [Further] and Summary of Evidence, and December 11, 2013 at p.2.) Applicant was terminated following an investigation involving a union representative, a company employee, and an arbitrator. As a result of the investigation, it was determined that applicant's conduct was reckless, resulting in a serious accident. (Minutes of Hearing and Summary of Evidence, January 23, 2014, at p. 2.)

For his orthopedic condition, applicant was evaluated by Dr. Senador on multiple occasions, resulting in six reports issued by Dr. Senador between July 14, 2010 through March 26, 2012 (Defendant's Exh's, A-F). Dr. Senador's opinion that applicant did not sustain injury arising out of and in the course of employment to his back, neck, and sleep was consistent throughout his opinions. In a report relied upon by the WCJ in his Opinion on Decision at page 2, Dr. Senador stated at pages 16-17 of his February 3, 2011 report (Defense Exh. B) that applicant's claimed non-psychiatric conditions were not caused by the August 8, 2008 injury.

For the psychiatric injury, applicant was evaluated by Dr. Furst, who provided reports dated December 16, 2011 (Defendant's Exh. H) and March 13, 2012 (Defendant's Exh. G). In the December 16, 2011 report, Dr. Furst reviewed numerous medical records, as well as applicant's deposition, and conducted an interview of applicant. He determined at page 38 that applicant suffered from a depressive disorder. At page 41, Dr. Furst stated that 50% of applicant's psychological disorder was caused by the emotional trauma of learning that a motorcyclist involved in the accident was killed, as well as the emotional trauma of being criminally charged with manslaughter in this death.[1] The remaining 40% of the causation of applicant's psychological disorder was due to applicant being terminated from his job due to his conduct involved in the auto accident, which Dr. Furst noted may be the result of a nondiscriminatory, good faith personnel action.

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[1] Criminal charges against applicant were eventually dismissed.

In his supplemental report of March 13, 2012, Dr. Furst stated at page 2, "I stated, in my 12/16/11 report, and restate here that in my opinion 40% of the psychological injury (Depressive Disorder) was caused by the stress of a good-faith personnel action of his being fired from his job after he was accused of causing the accident."

DISCUSSION

A. Defendant's Petition for Reconsideration

Labor Code section 3208.3(h) states:

> "No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue."

It is the injured worker's burden to establish a psychiatric injury under Labor Code section 3208.3(b), and then the burden shifts to defendant to establish the "good faith personnel action" defense as set forth in Labor Code section 3208.3(h). (*County of Contra Costa v. Workers' Comp. Appeals Bd. (Aliotti-Sceary)* (2006) 71 Cal.Comp.Cases 1857 (writ den.); see also *San Francisco Unified School District v. Workers' Comp. Appeals Bd. (Cardozo)* (2010) 190 Cal.App.4th 1 [75 Cal.Comp.Cases 1251].)

In *Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc opinion), we specified the standards to be used in by the WCJ evaluating psychiatric cases under Labor Code section 3208.3, stating:

> "The WCJ, after considering all the medical evidence, and the other documentary and testimonial evidence of record, must determine: (1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination; (2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence; (3) if so, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination; and (4) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a 'substantial cause' of the psychiatric injury, a determination which requires medical evidence. Of course, the WCJ must then articulate the basis for his or her findings in a decision which addresses all he relevant

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issues raised by the criteria set forth in Labor Code section 3208.3."(*Rolda, supra*, 66 Cal.Comp.Cases at p. 247.)[2]

In the instant case, the WCJ found that defendant met the first three factors of the *Rolda* decision. The WCJ found, however, that the opinion of Dr. Furst regarding causation attributable to the good faith personnel action of applicant's employment was not based upon reasonable medical probability. At page 4 of his Opinion on Decision, the WCJ stated, "Here, Dr. Furst's opinion is based on his own opinion because he did not say that it is based on reasonable medical probability. His own opinion is insufficient." In reviewing the opinion and reports of Dr. Furst as a whole, however, we find that his opinion is substantial evidence that 40% of applicant's psychological disorder was caused by the emotional trauma of his termination related to the auto accident.

In addressing the standard of review in a case analyzing a good faith personnel action defense, the Court Of Appeal stated in *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021 [67 Cal.Comp.Cases 1415]:

> In reviewing the evidence our legislative mandate and sole obligation under section 5952 is to review the entire record to determine whether the board's conclusion was supported by substantial evidence. (Citing *LeVesque v. Workmen's Comp. Appeals Bd.*, (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16].) Further, the Supreme Court has held, "The reviewing court must consider the entire record ([Labor Code] § 5952) and may not isolate only the evidence which supports the board's findings [citation] and thus disregard relevant evidence in the record. [Citation.]" (*LeVesque v. Workmen's Comp. App. Bd.*, supra, 1 Cal.3d at pp. 638-639, fn. 22.)

In reviewing Dr. Furst's entire comprehensive report of December 16, 2011, we find ample support for his determination that 40% of his psychological disorder was the result of his termination. At page 16 of the December 16, 2011 report from Dr. Furst, he reviewed records from Dr. Terisita Morales, Ph.D., between September 15, 2011 and October 13, 2011, and stated, "He reportedly experienced a great deal of grief over having lost his job, stating financial and emotional reasons." His summary of Dr. Morales' reports also noted that applicant was experiencing psychiatric symptoms related to the

[2] "Substantial cause" of the psychiatric injury is defined in Labor Code section 3208.3(a)(3) as 35% to 40% of the causation from all sources combined.

injury itself. At page 17 of his December 16, 2011 report, Dr. Furst noted that reports from Kaiser Mental Health from September 24, 2008 also noted psychiatric symptoms related to the injury, as well as his termination. Specifically, Dr. Furst summarized applicant's difficulty related to his termination, indicating, "The patient reported feeling as though his workplace was not supportive and understanding through (his termination) process."

Furthermore, the opinion of Dr. Furst regarding causation and apportionment of applicant's permanent disability was not limited simply to the industrial causation between the injury and events related to applicant's termination. At pages 41-43 of the December 16, 2011 report, Dr. Furst addressed numerous factors regarding apportionment of applicant's psychiatric impairment. Making numerous references to applicant's deposition testimony and records reviewed in conjunction with the preparation of his report, Dr. Furst stated that he rejected any apportionment of causation of the injury or of any portion of applicant's permanent disability being related to applicant's divorce, numerous deaths of his family and friends in recent years, an assault in September of 1999 which resulted in his arm being broken, a prior felony conviction and incarceration for substance abuse, a probation violation, and his history of treatment for alcoholism. Despite the fact that Dr. Furst did not apportion any causation of applicant's psychiatric condition to these numerous factors, Dr. Furst noted that applicant's reporting of his psychiatric history is at variance with information contained in the medical records. He specifically stated, "His denials of culpability in this felony conviction, his DUI arrests and incidents described in multiple poor performance reviews and write ups contained in his UPS personnel file, strains credibility."

Therefore, because we find that Dr. Furst adequately discussed the issue of causation of applicant's psychiatric disorder, we find that his opinion was based upon substantial medical evidence, when reviewing his opinion as a whole. Accordingly, we shall rescind the WCJ's Findings and Award and Order, and issue our own decision to find that applicant did not sustain an injury arising out of and in the course of employment to his psyche. As discussed below, we shall not disturb the portion of the WCJ's decision which found that applicant did not sustain an industrial injury to his back, neck, and sleep.

B. Applicant's Petition for Reconsideration

Issues not raised prior to the time of trial cannot be raised for the first time in a Petition for Reconsideration. (*County of Riverside v. Workers' Comp. Appeals Bd.* (*Hedden*) (2005) 77 Cal.Comp.Cases 70.)

Pursuant to California Code of Regulations, title 8, section 10856, where reconsideration is sought on the ground of newly discovered evidence which could not, with reasonable diligence, have been produced before submission of the case, the proponent of such evidence is required to provide an offer of proof, containing a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.

In reviewing the issues framed for trial, applicant did not raise the issue of admissibility of the reports of Dr. Senador due to allegations that his license to practice as a QME was suspended. (Minutes of Hearing and Summary of Evidence and Order of Consolidation, April 3, 2013.) There were five separate dates of trial, concluding on January 23, 2014, and this issue was not raised at any time prior to applicant's Petition. Therefore, this issue was first raised on reconsideration.

Because this issue was not raised prior to reconsideration, applicant attached a "Medical Unit – Disciplined Physicians List" as an exhibit to its Petition. Applicant did not, however, comply with California Code of Regulations, title 8, section 10856, because he did not provide any information, much less statutorily required offer of proof, as to why the proposed exhibit attached to applicant's Petition could not have been obtained earlier with the exercise of due diligence. Accordingly, we shall deny applicant's contentions.

Due to the serious nature of applicant's allegations, however, we note that there is no authority, and certainly none cited by applicant, in the Labor Code or in the regulations which indicates that reports of a QME are inadmissible during a suspension or probation of the QME's license by the Medical Unit. Labor Code section 139.2(m) specifies that a report of a QME is inadmissible if the QME has been suspended or placed on probation by the "relevant licensing board," which is the California Medical Board. The proposed exhibit attached to applicant's Petition does not allege that Dr. Senador was suspended or placed on probation by the relevant licensing board. Furthermore, an online search of the

records of the California Medical Board reveals that its only disciplinary action involving Dr. Senador at any time was a public reprimand on February 4, 2010, and that his license has not been suspended or revoked. Therefore, even if the unsubstantiated allegations regarding applicant's proposed exhibit are accurate, it does not constitute grounds to exclude the reports of Dr. Senador under Labor Code section 139.2(m).

Lastly, with respect to applicant's contention that the opinion of Dr. Senador is not substantial evidence on the issue of injury to applicant's back, neck, and sleep, we disagree.

Any decision by the Appeals Board or a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280–281 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 419 [33 Cal.Comp.Cases 659].) The opinion of a single physician may constitute substantial evidence, unless it is erroneous, beyond the physician's expertise, no longer germane, or based on an inadequate history, surmise, speculation, conjecture, or guess. (*Bolton, supra*, 34 Cal.3d at p. 169; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; see also *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620–621 (Appeals Board en banc).) Here, Dr. Senador conducted a thorough review of medical records after his physical examination of applicant, and there is no indication that his report runs afoul of any of the shortcomings recited above.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the April 4, 2014 Findings and Order in ADJ6679833 is **AFFIRMED.**

IT IS FURTHER ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the April 4, 2014 Findings, Award and Order in ADJ8786254 is **RESCINDED,** and the following is **SUBSTITUTED** in its place:

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FINDINGS OF FACT

1. Applicant, Gary McKinney, did not sustain injury arising out of and in the course of employment to his psyche, back, neck, and sleep while employed on August 8, 2008, as a driver/dockworker for United Parcel Services, insured by Liberty Mutual.

2. All other issues are moot.

ORDER

IT IS ORDERED that applicant **TAKE NOTHING**

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI

I CONCUR,

DEIDRA E. LOWE

PARTICIPATING, BUT NOT SIGNING

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 08 2014

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

mm

GARY MCKINNEY
LAW OFFICES OF ROBIN JACOBS
MICHAEL SULLIVAN & ASSOCIATES

JG:mm

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GARY MCKINNEY, ***Applicant,*** **vs.** **UNITED PARCEL SERVICE, administered by LIBERTY MUTUAL INSURANCE,** ***Defendants.***	**Case Nos. ADJ6679833** **ADJ8786254** **(Marina del Rey District Office)** **OPINION AND ORDER GRANTING PETITIONS FOR RECONSIDERATION**

Reconsideration has been sought by applicant and defendant, with regard to the decisions filed on April 4, 2014.

Taking into account the statutory time constraints for acting on the petitions, and based upon our initial review of the record, we believe reconsideration must be granted in order to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereinafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration are **GRANTED**.

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IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case(s), all further correspondence, objections, motions, requests and communications shall be filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th floor, San Francisco, CA 94102) or its Post Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall *not* be submitted to the Marina del Rey District Office or any other district office of the WCAB and shall *not* be e-filed in the Electronic Adjudication Management System.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

KATHERINE ZALEWSKI

CONCURRING, BUT NOT SIGNING
FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 23 2014

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

GARY MCKINNEY
LAW OFFICES OF ROBIN JACOBS
MICHAEL SULLIVAN & ASSOCIATES

JG:mm

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ66679833 (MF); ADJ8786254

GARY MCKINNEY	**VS.**	**UPS SUPPLY CHAIN SOLUTIONS; LIBERTY MUTUAL**
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE:		**HON.YVONNE R. JONES**
DATES OF INJURY:		**8/8/2007 through 8/8/2008; 8/8/08**

REPORT AND RECOMMENDATION ON PETITION FOR CONSIDERATION

I

INTRODUCTION

Petitioner, Gary McKinney, filed a Petition for Reconsideration against the Findings and Order dated 4/4/2014 in case no. ADJ6679833[1] and against Findings, Award and Order dated 4/4/2014, case no. ADJ8786254. Petition was filed timely but the verification is improper. Petitioner was employed as a driver/dockworker and sustained injury to his psyche arising out of and in the course of employment on 8/8/08 and alleged that he sustained injury to his sleep, back, and neck in case No. ADJ8786254 and alleged that he sustained injury to his psyche,

[1] This WCJ issued a First Amended Finding and Order and First Amended Decision on 4/7/14. This Petition for Reconsideration refers only to the Finding and Order and Decision dated 4/4/14.

sleep, back, right and left shoulder, neck, and feet during the period 8/8/07 through 8/8/08 in case number ADJ 6679833.

Petitioner contends the following:

1. The evidence doesn't justify the findings of fact that Petitioner didn't sustain injury to his sleep, back, and neck as a result of the cumulative trauma during the period 8/8/07 through 8/8/08 nor as a result of the specific injury which occurred on 8/8/08.

2. The evidence doesn't justify the findings of fact that Dr. Senador's reports are in substantial medical evidence pursuant to Petitioner's Attorney post-trial brief dated 2/2/14 attached as Exhibit A.

3. The evidence doesn't justify the findings of fact that Petitioner didn't sustain any injury to his sleep, back, and neck on 8/8/08 due to the fact that PTP Dr. Smith's MMI report dated 11/9/9 does not discussed the mechanism of the injury which occurred on 8/8/08 thereby relying upon PQME Dr. José Senador's report dated 2/3/11 stating that Petitioner did sustain any injury arising out of and occurring in the course of employment on 8/8/08.

4. Petitioner disagrees regarding the AOE/COE issue for Petitioner's orthopedic complaints allegedly sustained on 8/8/08.

5. If Dr. Smith, the PTP did not mention the mechanism of injury, WCJ should have relied upon Petitioner's testimony at trial and the PQME Dr. Senador's description of the mechanism of the injury.

6. PQME Dr. Senador's medical reports dated 7/14/10, 9/24/10, 1/20/11, 2/3/11, and 3/26/12, are inconsistent regarding AOE/COE analysis regarding Petitioner's

orthopedic complaints as argued in Exhibit A Petitioner's Attorney's post-trial brief dated 2/2/14.attached to the Petition for Reconsideration.

7. That Petitioner's Attorney's just recently found out that the PQME Dr. José Senador's medical license was suspended from the 7/15/10 to 10/14/10, with probation from 10/15/10 through 4/14/11 as shown on Exhibit B attached to the Petition for Reconsideration.

8. That because Dr. Senador's medical license was suspended during the time when he issued the report dated 9/24/10, the WCJ should do one of the following:

    a. The WCJ should Amend her Finding, Award and Order dated 4/4/2014 and find AOE/COE for sleep, back, and neck based on the medical report of PTP Dr. Smith

    b. The WCJ should issue an order to develop the record regarding Petitioner's orthopedic complaints and sleep problems utilizing an IME or reopening the discovery and issue an order for the Medical Unit to issue a replacement ortho panel.

9. That the personnel action was not in good faith because the employer failed to talk to Petitioner to obtain his side of the story before the termination.

10. The evidence doesn't justify the findings of fact that the Teamsters' contract defines recklessness which resulted in Petitioner's termination.

11. If Defendants had waited until the criminal charges were dropped by the judge, they would have had no grounds to terminate Petitioner for what had occurred on 8/8/08 with the death of the motorcyclist.

Petitioner's verification fails to comply with Labor code Section 5902 which provides that the petition shall be verified under oath and shall contain a general statement of any evidence or other matters upon which the applicant relies in support thereof.

Here the verification is improper on the grounds that it makes no reference to the Petition for Reconsideration. It only verifies that declarant is a member of the California State Bar. It makes no reference to the Petition for Reconsideration which is what is required to be verified.

Petitioner improperly refers and attaches his post-trial brief dated 2/2/14 in violation of Labor Code section 5902 and Cal Code Regs., title, section 10842. Rather than incorporating that brief into the petition, Petitioner attached it which is improper.

Notwithstanding the above mentioned violations of Petitioner's attorney, the Petition for Reconsideration should be granted as to both cases in order to preserve the integrity of the workers compensation system. Petitioner should not be penalized by the actions of his attorney.

II

SUMMARY OF FACTS

Applicant was born on _____. During the course of his employment he filed two industrial claims. He filed a CT from 8/8/07 to 8/8/08 in case number ADJ6679833 claiming to have sustained injury arising out of and in the course of employment to his psyche, sleep, back, right and left shoulder, neck, and feet. He also filed a

specific dated 8/8/08 in case number ADJ8786254 claiming to have sustained injury arising out of and in the course of employment to his psyche, sleep, back, and neck. While driving the company tractor-trailer, Petitioner was involved in a motor vehicle accident which resulted in the death of the motorcyclist.

III

DISCUSSION

A. ADJ 6679833; Continuous Trauma to a. 8/8/07 through 8/8/08

1. **This WCJ decision that Petitioners sustained no orthopedic injury in the continuous trauma case has been tainted by the license status of Dr. Jose Senador.**

It is well settled that issues not raised at MSC or a trial cannot be raised for the first time in a Petition for Reconsideration, **City of Anaheim v. Workers Compensation Appeals Board (Evans)** (2005) 70 CCC 237 writ denied.

Labor Code section 5903 allows a party to file the petition for reconsideration on the ground that he or she has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered or produced at the hearing.

Cal. Code Regs., title 8 section 10856 states that when reconsideration is sought on the grounds of newly discovered evidence that could not with reasonable diligence have been produced before submission of the case..., The petition must contain an offer of proof, specific in detailed, providing... A full and accurate statement of the reasons why the testimony or exhibits could not

reasonably have been discovered or produced before submission of the case. A petition for reconsideration may be denied it fails to meet requirements of this rule.

In the petition it states "Applicant's attorney just recently found out that PQME Dr. José Senador's license (License No. D-30062) was suspended 7/15/10 to 10/14/10, with probation 10/15/10 through 4/14/2011. Petitioner improperly attaches as Exhibit B the Medical Unit-Disciplined Decisions List to the Petition for Reconsideration.

Petitioner's attorney has not submitted an offer of proof which specifically, and in detailed includes a full and accurate statement of why the exhibit could not reasonably have been discovered or produced before submission of the case. He also fails to disclose when he discovered the exhibit.

Brodie v. Carmax 2013 Cal. Wrk. Comp P. D. LEXIS 474 cited by Defendants in their Answer to the Petition for Reconsideration is easily distinguishable from the case at bar. That case did not involve the following: a PQME who wrote a 29 page report, stated in the report that he spent 16 hours preparing the report which consisted of numerous medical and nonmedical records, that he wrote the report while he allegedly was suspended from the practice of medicine, and that very report was the basis of the WCJ's decision resulting in an orthopedic take nothing.

This WCJ based her decision on the medical report of PQME Dr. José Senador's report dated 9/24/10. According to the Exhibit which has yet to be authenticated, Dr. Senador's license was suspended from 7/15/2010 through 10/14/2010.

Without question what Petitioner's attorney did was wrong. The failure of Petitioner's attorney to state when he received the exhibit leads to the logical inference that he obtained the exhibit at the time of the MSC or during one of the 6 trial dates when testimony was taken. More importantly for Petitioner's attorney to wait until this WCJ issued her decision relying upon the medical report of Dr. Senador and then, and only then bring the matter of the license suspension to light is unprofessional, if in fact the suspension of license is correct and the attorney brought it to the court's attention only when it was advantageous to the outcome of Petitioners' case

In the opinion of this WCJ, if in fact Dr. Senador's license was suspended when he wrote his 29 page, 16 hour medical report dated 9/24/10 his conduct taints this report and all subsequent reports regarding Petitioner. Moreover, he issued a subsequent report dated 1/20/2011 in response to Petitioner's letter for clarification of the 9/24/10 report Either the parties should discuss selecting an AME or this WCJ should issue an order for replacement panel in ortho. In the opinion of this WCJ this is the only way that the integrity of the Workers Compensation can be preserved.

2. **This WCJ did not err in finding that Applicant did not sustain injury arising out of and in the course of employment to his sleep, psych, back, right and left shoulder, neck, and feet during the period 8/8/07 to 8/8/08**

Dr. Michael Smith the ortho PTP, issued a P & S medical report dated 11/9/09, Applicant's Exhibit 1. Petitioner submitted no other report from Dr. Smith even though Dr. Smith was the PTP. The report fails to discuss the continuous trauma. The psyche medical report of Dr. Maria E. Mayoral dated 4/6/09, Petitioner's Exhibit 2 also fails to discuss the continuous trauma as well as the

medical reports by PQME psyche Dr. Charles J. Furst dated 3/26/12, Defendant's Exhibit A, dated 2/3/11, Defendant's Exhibit B, dated 5/13/11, Defendant's Exhibit C, dated 1/20/12, Defendant's Exhibit D, Defendants Exhibit E dated 9/24/10, and Defendants Exhibit F dated 7/14/10. There is no medical evidence that Petitioner sustained an injury to his sleep arising out of and occurring in the course of employment during the period 8/8/07 to 8/8/08.

Charles J. Furst, Ph. D. a diplomat American Bd. of Clinical Neuropsychology psychology is the PQME in this case. The two medical reports issued by Dr. Charles J. Furst, Defense Exhibit G and Defense exhibit H, demonstrate that Dr. Charles J. Furst does not understand the difference between a specific injury and a continuous trauma injury. It is clear from his report marked Defendant's Exhibit H dated 12/16/11 that he took no history for a CT.

The first page of Dr. Furst's report dated 12/16/11, Defense Exhibit H shows date of injury CT: 8/8/07 to 8/8/08. However page 2 of the same report under the caption "History of Present Circumstances" contains no discussion of a CT from 8/8/07 through 8/8/08.

Exhibit G is Dr. Furst's response to a joint letter dated 3/2/12 requesting clarification of his opinions in his report dated 12/16/11. The parties asked Dr. Furst the following question:

1. "Was there a psychiatric injury as a result of the claimed cumulative trauma 8/8/07-8/8/08?

To this question, Dr. Furst stated the following:

In my opinion, Mr. McKinney ***does have a psychiatric injury*** (Depressive Disorder) which was predominantly caused by the trauma of his employment with UPS during the year 8/8/07 to 8/8/08. I would clarify that it was the specific events of the accident of 8/8/08 coupled with the psychological stressors which follow from the specific accident....

"... ***the attribution of causation to the specific incident of 8/8/08 is included in a continuous trauma claim that ends on the date 8/8/08, but it would seem logical that it does."*** (Emphasis added).

Dr. Furst's response to the question posed by the parties demonstrates that he has no understanding of the difference between a specific injury and the continuous trauma. Dr. Furst should have been deposed. He was not.

B. Specific injury 8/8/08 in case number ADJ8786254

1. Psyche injury

The Torrance Police Department traffic collision report, Defendant's Exhibit J, indicates that the applicant was turning left at an intersection with two side by side left turning lanes. Applicant was driving in the right left turning lane and a bobtail truck was in the left left turning lane. Applicant's truck was in the intersection when a motorcyclist proceeding in cross traffic struck Applicant's truck causing the motorcyclist's death.

According to the police report the police interviewed several witnesses to the accident. One witness suggested that the bobtail truck traveling in the left left turning lane partially or completely obstructed Applicant's view of the cross traffic. Another witness seemed to state that the bobtail truck entered the intersection and then backed up towards its stop sign in an effort to avoid the motorcyclist. Another witness suggested that the motorcyclist was speeding.

In the opinion of the investigating officer Applicant's view of the approaching westbound traffic was partially or completely obstructed by both bobtail truck and an RV. After stopping for the stop sign, Applicant caused this collision when he entered the intersection and failed to yield the right of way to the motorcyclist, a violation of California Motor Vehicle Code Section

21802 (a) and recommended that Applicant be charged with violating California Penal Code section 192 (c) (2), vehicular manslaughter.

A Kaiser Permanente Visit Verification Form dated 8/20/08, Defendant's Exhibit L which states that Applicant had been ill and unable to attend work from 8/13/08 through 8/24/08 and could return to full duties with no restrictions on 8/25/08.

When the Applicant saw Dr. Furst, the PQME, on 11/22/11 and on 11/30/11 page 2, Defense Exhibit H, Applicant told him that 2 hours following the accident he was at UPS terminal and was told that the motorcyclist had died. He describes himself as being in a state of emotional shock upon hearing it. He was told by his employer to take time off from work to recover emotionally, and they provided him a list of psychotherapy providers. Three weeks after the incident while still on temporary disability leave he was told by UPS that the accident was his fault and he was subsequent notified that he was terminated because of the accident.

According to the visit verification form it appears that on September 23, 2008[2] Applicant received a psychiatric diagnostic interviews last initial assessment at Kaiser by Kenneth Reiter, LCSW. Applicant was diagnosed with an adjustment disorder with anxiety and depression. Defendant's Exhibit M pages 1 through 4. Applicant continued to treat at Kaiser to January 2009.

According to record, on September 3, 2008, Applicant was issued a notice that he was being terminated from his employment at UPS because of his involvement in the 8/8/8 motor vehicle accident. Applicant filed a grievance with the union over his termination. A grievance

[2] In the medical report of Dr. Furst dated December 16, 2011, Defense Exhibit H, Applicant was told by his employer to take time off from work to recover emotionally and they provided him a list of psychotherapy providers. Three weeks after the incident while still on temporary disability leave.... Shows that Applicant's employer knew that applicant was having emotional difficulties about the accident and his employer should have given Applicant a claim form before they sent him home on 8/8/08, but they did not. Moreover it shows that September 23, 2008 was not the first time the Applicant was seen for his alleged psyche disability.

hearing was held on October 6, 2008. Minutes of Hearing/Summary of Evidence dated 7/29/13. Applicant was represented by Teamster.

In **Rolda**, 66 CCC 241 (2001) ***en banc*** decision, the board set forth a four prong analysis in determining an allege industrial psyche injury under labor code section 3208.3. **First**, the WCJ must determine whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination.

Here it is undisputed that Applicant was employed as a driver/dockworker for UPS. It is undisputed that he was driving a tractor-trailer for UPS doing his regular and customary duties when his vehicle collided with the motorcyclist resulting in the unintended death. In the opinion of this WCJ Applicant's alleged psychiatric injury involved the actual events of employment which included the unintended death of the motorcyclist, his grief and other psychological problems surrounding it.

Second, the medical evidence must determine whether such actual events were the predominate cause of the psychiatric injury. The medical reports of Dr. Furst dated 12/16/11, and 3/13/12, Defendants Exhibits G and H respectively, support the fact that the actual events of employment were the predominate cause of Applicant's psychiatric injury.

Third, the WCJ must determine whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination. Defendants' Exhibit O consists of designated portions of the grievance hearing requested by Applicant. Page 3 of the exhibit is a letter dated 9/3/08 and addressed to Applicant from Ron McDonough, UPS-LAX Operations. The letter states that Applicant was terminated for recklessness resulting in a serious accident while on duty pursuant to Article 10, §2(d) of the Teamsters Local 986 Contract and the UPS Cartilage Services, Inc., Supplemental

Agreement and all applicable articles. Said exhibit also includes a certified mail return receipt requested bearing the name and signature of Applicant.

Article 10 referred to in the letter is entitled Discharge or Suspension. It states in pertinent part the following:

"2. The Company believes in progressive discipline. Employees will not be discharged or suspended for cause without prior warning letter and the prior suspension for a similar infraction, with a copy to the Union Representative, except that no warning notice or suspension need to be given to an employee before his/she is suspended or discharged if the causes of suspension or discharge is:

d. **Recklessness resulting in a serious accident while on duty**."

(Emphasis added).

Defendants' Exhibit J consists of designated portions of the subpoenaed records from Torrance Police Department which includes the collision report, several police supplemental investigative reports, as well as photographs of the scene. On page 20 of Exhibit J the investigating officer stated that based on his investigation, in his opinion, Applicant's view of the approaching westbound traffic was partially or completely obstructed by both bobtail truck and an RV. After stopping for the stop sign, Applicant caused this collision when he entered the intersection and failed to yield the right of way to the motorcyclist, a violation of California Motor Vehicle Code Section 21802 (a) and recommended that Applicant be charged with violating California Penal Code section 192 (c) (2), vehicular manslaughter.

Joseph Snedeker appearing on behalf of the defendants testified that he has worked for UPS for 9 years as a labor manager for the West Coast. In that capacity he has been involved with grievances and discipline of union employees. He has been involved on behalf of the

employer in about 1000 grievances including 20 to 25 terminations. In his capacity as labor manager he gathers facts and information by talking to his boss and other people involved in the company. A termination letter is issued and the employee has the right to file a grievance.

Applicant filed a grievance. In that arena the panel consists of a union representative, a company employee, as well as an arbitrator. The case is presented before the panel. The evidence before the panel consists of documents and witnesses and the employee may testify. The company representative and the union representative make a decision but if there is a deadlock, the arbitrator makes a decision. The arbitrator's decision is binding. In the case at bar, the panel reached a deadlock and the arbitrator made the decision to terminate Applicant. Applicant was terminated from UPS for recklessness while on duty.

After the termination letter was sent to the applicant, which is a personnel action, Applicant had the opportunity to appeal it. Applicant exercised his right to appeal his termination which resulted in a grievance hearing. At the grievance hearing he was represented by a union rep, was given an opportunity to present evidence and to testify if he so desired at the hearing. Although the panel members were deadlocked, the arbitrator who also listened to all the evidence broke the deadlock. In the opinion of this WCJ there is substantial evidence that the personnel actions were lawful, nondiscriminatory, and in good faith.

Finally, there must be a medical determination as to whether the lawful, nondiscriminatory, good-faith personal actions were a substantial cause of the psychiatric injury. In his report dated March 13, 2012, Dr. Furst, Defendants Exhibit G, stated the following:

"You also asked me to clarify my apportionment. I stated, in my 12/16/11 report and restated here that *in my opinion* 40% of the psychological injury (Depressive Disorder) was

caused by the stress of a good faith personnel action of him being fired from his job after he was accused of causing the accident." (Emphasis added).

According to the medical reports of Dr. Furst, there is substantial evidence that the personnel actions were 35 to 40% of Applicant's psyche injury. In rendering a medical opinion, it must be based on "reasonable medical probability". Here Dr. Furst's opinion is based on his own opinion. He does not say that it is based on reasonable medical probability. His own opinion is insufficient. As a PQME he is required to know the correct standard to use. The standard is not arbitrary or capricious.

The fact that Dr. Furst has taken a complete and accurate history of Applicant, reviewed the medical records, examined the applicant, and reviewed psychiatric test results is only part of his job. He must take that information and give an opinion as to the meaning of the information that he was reviewed. Reasonable medical probability is at least 51%, whereas opinion not based upon reasonable medical probability might be 25%. The importance of the Dr. Furst using the proper standard impacts whether or not the opinion given is substantial evidence. Here there was nothing to quantify his opinion other than to say it is his opinion.

There is lack of substantial evidence that the lawful, nondiscriminatory, good-faith personnel actions were a substantial cause of the psychiatric injury. Dr. Furst has not stated that he gives his opinion based upon reasonable medical probability. Defendants have failed to prove one of the prongs of the 5 prong test set forth in **Rolda**. There is no substantial evidence that the lawful nondiscriminatory, good-faith personnel action was a substantial cause of the psychiatric injury. Applicant's psychiatric claim is not barred by Labor Code Section 3208.3 (h). Applicant sustained a compensable psychiatric injury. The PQME report by Dr. Charles Furst did not establish that Applicant's psychiatric injury was substantially caused by his

termination. This WCJ did not err in finding that there was a lack of substantial evidence that the lawful, nondiscriminatory, good-faith personal actions were not a substantial cause of the psychiatric injury.

2. **This WCJ decision that Petitioners sustained no orthopedic injury in the this case has been tainted by the license status of Dr. Jose Senador.**

The medical report of Dr. Michael D. Smith, the PTP, dated 11/9/09, Petitioners Exhibit 1, refers to the fact that Dr. Smith issued prior reports. Said report does not discuss the mechanism of the injury which occurred on 8/8/08. Said report, standing alone, cannot be considered substantial evidence as to any issue presented here because the report is incomplete without the other reports which were written by Dr. Smith. In determining substantial evidence, one must look to the reports written by the same doctor without referring to medical reports written by other doctors.

This WCJ relied upon the medical reports of Dr. José J Senador, the PQME in orthopedics, as having the only reports that not only discussed the mechanism of the alleged injury but also thoroughly review the medical records regarding Petitioner's alleged orthopedic and sleep injuries. This WCJ based her opinion on his report dated 2/3/11, Defendant Exhibit B. The status of his medical license poses a real problem even though this medical report was issued after the period of his medical license suspension. This failure to disclose his license suspension to the parties who were receiving his report on this case taints his veracity to author subsequent reports on this case.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be granted on both case numbers.

Yvonne R. Jones

Yvonne Jones
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

DATED: MAY 19, 2014

SERVED ON: 5/19/14

GARY MCKINNEY
LIBERTY MUTUAL 29073 GLENDALE
MICHAEL SULLIVAN EL SEGUNDO
ROBIN JACOBS LOS ANGELES
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